

51. Many kinds of bacteria live in the human digestive tract.
52. Human excrement is a primary source of bacteria in domestic wastewater.
53. Domestic wastewater contains very high concentrations of bacteria of many kinds.
54. Bacteria are a major public health concern.
55. Some bacteria that may be found in domestic wastewater are pathogenic.
56. Viruses are sub-microscopic agents that affect life forms.
57. More than 100 different viruses are known to be excreted by human beings.
58. Viruses have been identified as a subject of concern in POWTS.
59. The quality of groundwater is affected by human-caused contaminants such as pathogenic bacteria, nitrates and pesticides.

POWTS FACILITATE SCATTERED AND UNSEWERED DEVELOPMENT

60. Rural and suburban development in Wisconsin is dependent on the use of POWTS technologies.
61. POWTS facilitate dispersed development and the conversion of agricultural and forest land.
62. Rural and suburban development dependent on the use of POWTS cause impacts on surface waters, direct loss of habitat, ecological simplification, fragmentation and environmental pollution.
63. Problems associated with treatment and disposal of septage and other byproducts increase as the number of POWTS increases.

64. Groundwater is the water that occurs in a saturated condition in the soil and geologic materials below the ground surface.

65. The point where groundwater begins below the ground surface is the water table.

66. Approximately 70% of Wisconsin's residents and 97% of Wisconsin's municipalities rely on groundwater to meet their water supply needs.

67. POWTS under the current regulatory code rely primarily on either unsaturated in-situ soil or a combination of unsaturated in-situ and engineered soil for treatment and dispersal of domestic wastewater.

68. Conventional POWTS require at least 56 inches of suitable soil in order to provide a 36-inch unsaturated zone above groundwater or bedrock and approximately 20 inches for the placement and covering of the distribution system.

69. POWTS facilitate development outside of sewer areas.

70. Comm. 83 purports to adopt procedures to approve POWTS to serve sites that are not physically suitable for currently approved POWTS.

71. Approximately 20 million acres of land in Wisconsin are physically suitable for currently approved POWTS.

72. Approximately 8.9 million acres of land in Wisconsin do not have the physical conditions necessary to install currently approved POWTS, other than holding tanks.

73. Comm. 83 will allow approval of POWTS that will permit development of the approximately 8.9 million acres that do not have the physical conditions necessary to install currently approved POWTS.

74. Comm. 83 will allow unsewered development with POWTS on sites with less than 24 inches of unsaturated soil, which will permit the potential development of up to 8.9 million acres of land.

75. The effect of Comm. 83 will be to encourage unsewered development and urban sprawl into rural areas without urban services.

COMM. 83 WILL CAUSE ADVERSE ENVIRONMENTAL EFFECTS

76. Development encouraged by Comm. 83 will cause long term adverse environmental and social impacts on air quality, water quality, solid waste management, water supplies, transportation systems, agricultural and forestry management, and delivery of educational and social services.

77. The plaintiffs and their members will be adversely affected by Comm. 83 because of the cumulative environmental impacts of Comm. 83, including, but not limited to, loss of agricultural land, transportation impacts, impacts on central cities and other impacts on the human environment in Wisconsin.

78. Comm. 83 can reasonably be expected to cause the increased spread of population into previously undevelopable areas which will lead to: reduced compactness of development, with corollary increased geographic spread of transportation networks, increased geographic spread of impervious surfaces and runoff of contaminants from roadways into waterways, such as chlorides from road salt, metals, silt; reduced energy efficiencies in transportation networks; increased air pollution arising from increased automobile emissions; increased threats to biological communities which sustain human populations through ecological services, such as

clean water, air, and renewable resources, and through aesthetic and other intangible amenities for all Wisconsin citizens.

79. The increased spread of population into previously undevelopable areas will also lead to increased homogenization of the landscape, and thereby loss of unique aesthetic elements of both urban and rural landscapes, reductions in urban population growth rates relative to other areas of the state, loss of economic support for urban landscapes and other elements of the urban human environment, and loss of economic support for environmental regulatory programs in urban areas.

80. The plaintiffs' interests will be directly and substantially injured by Comm. 83 in that the rule will make effective planning and development of integrated, sanitary sewer systems more difficult and more expensive for its members and the users of members' systems.

81. Comm. 83 will promote the development and use of POWTS in areas that are currently unsewered; in existing sewer service areas where service has been planned but not yet provided, installation of POWTS will increase the costs of extending sewer lines to those users that require sewer service (such as hospitals or commercial facilities) by decreasing the number of users. To the extent that POWTS are outside of a current sewer service area, projecting future sewer service area boundaries and providing service in a cost-effective manner will become increasingly difficult.

82. If not properly monitored or maintained POWTS will fail, in which case it may be necessary to provide sanitary sewer service to these facilities; doing so will create additional

planning and economic problems, particularly if they are outside existing sewer service area boundaries and outside of neighboring developed areas.

83. The problems of planning and funding sewer extensions will be exacerbated by the fact that Comm. 83 has not incorporated the provisions mandating hook-up to sewers that existed under prior regulations.

COMM. 83 WILL ADVERSELY AFFECT CRITICAL HABITATS

84. Comm. 83 will have substantial impacts on the human environment in Wisconsin.

85. Rare, threatened and endangered species inhabit the lands where unsewered development may occur, and these species are sensitive to impacts related to changing land use and development patterns precipitated by allowing POWTS on shallower soils.

86. Under Comm. 83, development with POWTS could shift to sites not currently suitable for development, for example, sites where holding tanks are currently banned, thereby having significant local land use implications.

87. By allowing development of currently undevelopable sites, Comm. 83 will have the effect of allowing disturbance or destruction of sensitive habitat that would not have been destroyed under the current plumbing code.

88. Comm. 83 will increase the rate of residential construction on sites where development cannot currently occur under the existing plumbing code, which construction can lead to losses in habitat, forest land, agricultural land, wetlands, scenic vistas, hydrologic alterations, and disturbance to wildlife.

COMM. 83 WILL ADVERSELY AFFECT WISCONSIN'S GROUNDWATER SUPPLIES

89. POWTS contribute a variety of chemical and biological constituents to the groundwater.

90. Common wastewater constituents, such as bacteria, viruses, nitrate, chloride, phosphorus, solids, biochemical oxygen demand, and volatile organic compounds, pose a risk to the public health and environment.

91. Comm. 83 will increase constituents found in groundwater because POWTS are a source of contamination of groundwater and drinking water supplies.

ENFORCEMENT FOR FAILED POWTS IS PROBLEMATIC

92. Once groundwater is contaminated, the process of remediation is costly and difficult, and remediation may not be possible for some contaminants.

93. The attainment or exceedence of groundwater and other performance standards for POWTS is difficult to detect after they are installed.

94. Samples from wells may be obtained, but it is often difficult to determine the source of contaminants.

95. In the absence of practical means for determining the exceedence of standards, after-the-fact enforcement of standards is of little practical effect.

96. According to the Department of Commerce, it is expected that many new POWTS will not comply with the fecal coliform final effluent quality standards.

97. It is costly and difficult to monitor or sample groundwater that is receiving substances discharged by POWTS after they are installed.

98. Violations of groundwater protection standards are not systematically identified or reported under the current plumbing code and Comm. 83 does not change this.

HIGH TECH POWTS ARE MORE PRONE TO FAILURE

99. POWTS that require greater levels of human interaction, such as frequent maintenance, are more prone to failure caused by human error.

100. Systems that involve more complex siting, design, installation, operation or maintenance have a greater probability of human error that results in improper performance in systems that involve fewer and less complex human inputs.

101. Comm. 83 will allow the use of any POWTS technology that is considered to comply with the "intent" of Comm. 83.

102. Comm. 83 purports to increase flexibility in POWTS product approval, such that few non-conventional system designs will be considered experimental.

103. According to the Department of Commerce, the number of POWTS using non-soil treatment components, reduced vertical separations, and higher application rates, will likely increase under Comm. 83.

104. Comm. 83 will allow new types of POWTS technologies that do not rely solely on soil for treatment.

105. POWTS that do not rely solely on soil for treatment will require more frequent monitoring in order to ensure proper performance.

106. POWTS allow discharge of sewage system effluent to the subsurface waters of the state.

107. A primary impact of POWTS is the contamination of water resources by substances discharged in domestic wastewater and not fully removed by POWTS.

108. POWTS can have a direct impact on groundwater quality because they discharge untreated human wastewater, containing pollutants such as bacteria, fecal coliform, viruses, ammonia, nitrate, phosphorus chlorides and volatile organic compounds, to the soil and eventually to the groundwater.

COMM. 83 REPRESENTS A NON-CONSERVATIVE REGULATORY PHILOSOPHY

109. Comm. 83, according to the Department of Commerce, represents a complete reevaluation of the current code for approving POWTS.

110. The stated purpose of Comm. 83 is to establish minimum standards and criteria for the design, installation, inspection and management of POWTS.

111. The Department of Commerce further states that the intent of Comm. 83 is to provide a flexible means to recognize new technologies so as to ensure that there will be a sewage solution for every improved building site in the state.

112. Comm. 83, nonetheless, is required to satisfy the statutory requirements of Chapter 160, Wis. Stats., and the groundwater standards of NR 140, Wis. Adm. Code.

113. Comm. 83 purports to differ from the predecessor code in that design and installation specifications for POWTS do not need to be written into the code, which otherwise requires the Department to go through a rule making process.

114. According to the Department of Commerce, the predecessor code is essentially conservative in that new technologies are not quickly approved.

115. According to the Department of Commerce, because POWTS allowed under the predecessor code are generally effective, the low rate of introduction of new technologies has not had a significant adverse impact on groundwater in Wisconsin.

116. The process in Comm. 83 for approving new technologies, according to the Department, will increase the Department's flexibility to approve new POWTS and to allow the Department to more easily change approved designs.

117. POWTS that involve more complex siting, design, installation, operation or maintenance, have a greater probability of human error that results in improper performance than systems that involve fewer and less complex human inputs.

118. The POWTS approved under Comm. 83 are expected to be more complex than the POWTS approved in the predecessor code.

119. Comm. 83 will cause an increased burden on the Department of Commerce in the areas of plan review and product approval, where staff will be required to evaluate new and more variable POWTS plans and designs, as well as evaluate the documentation and data submitted to support design and performance claims.

FIRST CLAIM: FECAL COLIFORM DANGER

120. Realign and incorporate paragraphs 1 -119 of the Complaint as if fully set forth.

121. Human excrement is a primary source of bacteria in domestic wastewater.

122. Bacteria present a major public health concern.

123. Fecal coliform provides an accepted measure of possible releases of bacteria from POWTS.

124. Fecal coliform bacteria are an easily identifiable group of bacteria whose presence indicates a probable source from the intestinal tract of humans or other warm blooded animals.

125. The presence of fecal coliform in drinking water makes it more likely that the bacteria have a human origin.

126. Because coliform may pose a significant human health threat, NR 140, Wis. Adm. Code adopts a total coliform standard.

127. Comm. 83 does not comply with the NR 140 standard for total coliforms.

128. The Department of Commerce is prohibited by the provisions of ch. 160, Wis. Stats., from adopting administrative rules that do not comply with NR 140.

129. Comm. 83 does not meet the standards of NR 140 for total coliform.

130. Comm. 83 is contrary to law and exceeds the authority of the Department of Commerce because of the failure to comply with the NR 140 standard for total coliform.

SECOND CLAIM: NO GROUNDWATER STANDARDS

131. Reallege and incorporate paragraphs 1 -130 of the Complaint as if fully set forth.

132. Comm. 83 is required to comply with the groundwater enforcement standards and preventive action limits specified in NR 140, as required by ch. 160, Wis. Stats.

133. The Department of Commerce may not promulgate rules defining design and management practice criteria for POWTS which permit an enforcement standard to be attained or exceeded at the point of standards application.

134. Although Comm. 83 purports to adopt a standard-based regulatory system, Comm. 83 does not provide measurable performance criteria for approving POWTS that ensure

compliance with the enforcement standards and preventive action limits specified in NR 140 at the point of standards application.

135. Comm. 83 does not require that the design of POWTS meet the enforcement standards and preventive action limits specified in NR 140.

136. Comm. 83 only purports to prohibit POWTS owners from introducing wastewater or substances in such quantities or concentrations to a POWTS that results in exceeding the enforcement standards and preventive action limits specified in NR 140, but Comm. 83 does not require that POWTS product approval ensure compliance with NR 140.

137. Comm. 83's prohibition against discharging substances into POWTS by owners, that would result in an exceedence of a public health or welfare standard in NR 140, allegedly means that owners and operators of POWTS may not dump contaminants into these systems which the systems are not designed to handle, or which would exceed the capacity of the system, if doing so would cause an exceedence of a standard in NR 140.

138. Because POWTS users are not familiar with the chapter NR 140 standards, however, they are unlikely to know whether what they are dumping into their system is in or out of compliance and, therefore, because of this lack of user knowledge and the difficulty and costs of demonstrating exceedences, this prohibition does not constitute a rule which defines design and management practice criteria for POWTS designed to be technically and economically feasible to minimize the level of substances in groundwater and to maintain compliance with preventive action limits, as required by ch. 160, Wis. Stats.

139. Comm. 83 is contrary to the requirements of ch. 160, Wis. Stats., because it fails to adopt design criteria for POWTS that ensure compliance with enforcement standards and preventive action limits specified in NR 140.

140. The Department of Commerce in enacting Comm. 83 without specifying design criteria based upon the enforcement standards and preventive action limits in NR 140 acted contrary to law and exceeded its authority.

141. Comm. 83 is invalid and unenforceable based upon the Department of Commerce's failure to adopt rules in compliance with the groundwater protection standards of ch. 160, Wis. Stats., as implemented by the enforcement standards and preventive action limits specified in NR 140.

THIRD CLAIM: NITRATE HAZARD

142. Reallege and incorporate paragraphs 1 -141 of the Complaint as if fully set forth.

143. Chapter 160, Wis. Stats., Groundwater Protection Standards, requires that numerical standards for allowable levels for various substances in groundwater be implemented in the programs of each state agency.

144. Administrative rules were issued in 1985 in Chapter NR 140, Wis. Adm. Code, to establish specific numerical groundwater standards, as required by ch. 160, Wis. Stats.

145. Nitrate is a regulated substance that can be found in groundwater that is subject to specific numerical groundwater standards under Chapter NR 140, Wis. Adm. Code.

146. Nitrate poses a potential human health hazard, including because elevated levels of nitrate in drinking water have been associated with causing methemoglobinemia ("blue baby")

syndrome) in infants by reducing the oxygen carrying capacity of blood; this condition may be fatal.

147. The groundwater standard for nitrate-nitrogen under NR 140 is the same as the federal enforcement standard and the federal preventive action limit.

148. Comm. 83 does not comply with the NR 140 groundwater standards for nitrate.

149. Comm. 83 does not comply with the NR 140 nitrate standard, ostensibly on the basis of § 160.255, Wis. Stats.

150. According to the Department of Commerce, § 160.255, Wis. Stats., delegates discretionary authority to the Department to except POWTS from the groundwater standards for nitrate in NR 140.

151. The delegation of legislative authority to administrative agencies, however, must be subject to discernable standards that govern the exercise of agency discretion.

152. Section 160.255, Wis. Stats., purports to delegate authority to regulate nitrates, or the authority not to regulate nitrates, to the Department of Commerce, without any standards to govern the Department's exercise of discretion.

153. Section 160.255, Wis. Stats., constitutes an impermissible attempt to delegate unrestricted discretion to the Department of Commerce without any standards to govern the exercise of the Department's discretion.

154. The Department of Commerce's decision to except Comm. 83 from the groundwater standards of NR 140 exceeds the scope of authority that may be properly delegated to the Department by the Wisconsin Legislature.

155. Because § 160.255, Wis. Stats., constitutes an impermissible delegation of legislative authority to the Department of Commerce, without standards, the resulting exclusion of nitrates as a regulated groundwater substance under Comm. 83 is in excess of the Department's legally delegated authority.

156. The exclusion of any nitrate standard in Comm. 83 is invalid and unenforceable because it is based upon an improper delegation of purported authority pursuant to § 160.255, Wis. Stats.

FOURTH CLAIM: PRODUCT APPROVALS DEFICIENT

157. Realign and incorporate paragraphs 1 -156 of the Complaint as if fully set forth.

158. The Department of Commerce may not promulgate rules defining design and management criteria for POWTS which permit an enforcement standard under NR 140 to be attained or exceeded at the point of standards application.

159. The Department of Commerce also must review its rules and promulgate rules or amendments to rules necessary to ensure that POWTS will comply with all enforcement standards or preventive action limits established by the DNR for a substance, including the standards of NR 140.

160. The Department of Commerce has incorporated into Comm. 83 manuals with complete design and installation specifications for pre-approved POWTS.

161. The pre-approved POWTS designs apparently do not comply with the groundwater standards of NR 140.

162. The Department of Commerce has not reviewed the six pre-approved POWTS designs incorporated into Comm. 83 to ensure that these technologies comply with the groundwater protection standards in ch. 160, Wis. Stats., as implemented by NR 140.

163. The Department of Commerce's incorporation of pre-approved POWTS designs into Comm. 83 constitutes the promulgation of a rule defining design and management criteria that permits an enforcement standard to be attained or exceeded at the point of standards application.

164. Comm. 83's pre-approval of POWTS design technologies exceeds the authority of the Department of Commerce and is contrary to law as established in ch. 160, Wis. Stats.

FIFTH CLAIM: UNAUTHORIZED VARIANCES

165. Reallege and incorporate the allegations of paragraphs 1- 164 of the Complaint as if fully set forth.

166. Comm. 83 purports to allow variances for new POWTS.

167. The Comm. 83 variance rule is contrary to § 145.24, Wis. Stats., and exceeds the limits of the Department of Commerce's delegated authority.

168. Section 145.24, Wis. Stats., only authorizes the Department of Commerce to grant variances for existing POWTS that are not failing and which do not pose a threat of contamination to the waters of the state.

169. The Comm. 83 variance rule is contrary to law and exceeds the delegated authority of the Department of Commerce.

SIXTH CLAIM: DEFICIENT ENFORCEMENT

170. Reallege and incorporate the allegations of paragraphs 1 -169 of the Complaint as if fully set forth.

171. When the concentration of a substance in groundwater attains or exceeds a preventive action limit at a point of standards application for a specific site, as established by NR 140, a regulatory agency must assess the cause of the increased concentration and the agency must implement responses for a specific site designed to minimize the concentration of the substance in the groundwater; regain and maintain compliance with the preventive action limit; and ensure that the enforcement standard is not attained or exceeded at the point of standards application.

172. Comm. 83 does not require the Department of Commerce to implement a response when a preventive action limit is attained or exceeded at a specific site.

173. Comm. 83 is contrary to law and exceeds the authority of the Department of Commerce to enact because it is in conflict with § 160.23, Wis. Stats.

SEVENTH CLAIM: NO ENFORCEMENT RESPONSES

174. Reallege and incorporate the allegations of paragraphs 1 -173 of the Complaint as if fully set forth.

175. When the concentration of a substance in groundwater attains or exceeds an enforcement standard at a point of standards application, the regulatory agency must prohibit the activity or practice which uses or produces the substance and implement remedial actions with respect to the specific site, unless it can be shown to the regulatory agency, to a reasonable

certainty, by the greater weight of the credible evidence, that an alternative response will achieve compliance with the enforcement standard at the point of standards application.

176. Comm. 83 does not require the Department of Commerce to implement a response when an enforcement standard is attained or exceeded at a specific site.

177. Comm. 83 is contrary to law and exceeds the authority of the Department of Commerce to enact because it is in conflict with § 160.25, Wis. Stats.

EIGHTH CLAIM: NO STATEWIDE STANDARDS

178. Reallege and incorporate the allegations of paragraphs 1 -177 of the Complaint as if fully set forth.

179. The design criteria for POWTS must be based upon uniform standards of statewide applicability.

180. Comm. 83 adopts procedures for approving POWTS that are not based upon uniform standards of statewide applicability, including, without limitation, because the procedure for variances renders Comm. 83 indefinite as to what POWTS may be approved.

181. Comm. 83 is contrary to law and exceeds the authority of the Department to enact because it does not establish uniform design criteria of statewide applicability for POWTS, as required by Chapter 145, Wis. Stats.

NINTH CLAIM: DEFICIENT ENVIRONMENTAL IMPACT STATEMENT

182. Reallege and incorporate the allegations of paragraphs 1 -181 of the Complaint as if fully set forth.

183. The Wisconsin Environmental Policy Act (“WEPA”) requires agencies undertaking major actions with the potential to significantly affect the environment to prepare an Environmental Impact Statement (“EIS”) before proceeding with the action.

184. An EIS is required to address those aspects of proposed agency action that may cause potentially significant impacts.

185. Comm. 83 constitutes a major action with the potential to significantly affect the environment.

186. Comm. 83 purports to adopt a fundamental change in regulatory policy.

187. According to the Department of Commerce, the major change in Comm. 83 is that “the rigid specifications and limited options for the construction and installation of on-site sewage systems are removed from the code. They are replaced with a final effluent quality standard (outcome) and new procedures for approvals that are intended to allow more flexibility in authorizing new technology.”

188. The Department of Commerce describes the prior regulatory policy as “prescriptive.”

189. According to the Department of Commerce, the intent of Comm. 83 is “to provide a flexible means to recognize new technology” and to provide for an on-site sewage solution for every approved building site in the state.

190. According to the Department of Commerce, Comm. 83 is intended to provide flexible procedures to recognize new on-site sewage system technologies.

191. According to the Department of Commerce, the prior prescriptive regulatory policy limited some homeowners' choices of where to build and some communities' choices of where to site development.

192. According to the Department of Commerce, Comm. 83 is not intended to be used as a means for controlling local land use effects.

193. The "prescriptive" code being replaced by Comm. 83 contains within it the specifications for installation of systems or components of systems.

194. The abandonment of a "prescriptive" regulatory policy as being too conservative, in favor of "flexible procedures" to recognize new technologies in Comm. 83, constitutes an integral part of Comm. 83 that has the potential to cause significant impacts.

195. The EIS prepared by the Department of Commerce for Comm. 83 does not address the change in regulatory philosophy and procedures as they may significantly affect the environment.

196. The EIS prepared by the Department of Commerce fails to consider the change in regulatory policy or philosophy as constituting a distinct aspect of Comm. 83 with the potential to significantly affect the environment.

197. The "flexible procedures" of Comm. 83 is considered by the Department of Commerce to be the most significant aspect of Comm. 83, but the EIS does not independently address the efficacy of the Comm. 83 procedures or compare the potential impacts of the procedures for approving new technology to the allegedly "conservative" procedures of a

prescriptive code; Comm. 83 merely assumes the efficacy of its regulatory philosophy and procedures.

198. The Comm. 83 EIS is deficient in failing to specifically consider the potential impacts of different regulatory procedures for approving new technology.

199. The Comm. 83 EIS also takes a unique approach in only considering the status quo as an alternative to the new regulations.

200. WEPA requires that an acceptable EIS meaningfully consider alternatives to the proposed action.

201. The Comm. 83 EIS fails to meaningfully consider alternative implementation issues, such as monitoring and maintenance, the use of moratorium areas, the use of quotas, and other alternatives that were not considered.

202. The Comm. 83 EIS also fails to meaningfully consider the authority of local zoning authorities to impose limitations on POWTS approved by the Department of Commerce.

203. Comm. 83 is invalid because it was promulgated without compliance with WEPA.

WHEREFORE, the plaintiffs request that the court:

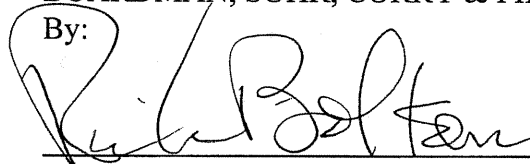
- A. Declare that Comm. 83 is invalid because it is contrary to law and exceeds the statutory authority of the Department of Commerce to enact;
- B. Declare that Comm. 83 is invalid because it was promulgated without compliance with statutory rulemaking procedures required under WEPA;

- C. Issue a temporary and permanent injunction prohibiting enforcement of Comm. 83, which should be deemed invalid and of no force or effect;
- D. Award plaintiffs their costs of litigation as allowed by law; and
- E. Grant such other and further relief as the court deems just and equitable.

Dated: June 5, 2000

BOARDMAN, SUHR, CURRY & FIELD LLP

By:



Lawrie J. Kobza; State Bar No. 1009282
Richard L. Bolton; State Bar No. 1012552
One South Pinckney Street, Suite 410
P. O. Box 927
Madison, WI 53701-0927
Telephone: 608-257-9521
Facsimile: 608-283-1709

Attorneys for Plaintiffs

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